IN THE

Supreme Court of the United States

OCTOBER TERM, 1923.

No. 335 [redacted]70

HERMAN G. GERDES, as Trustee in Bankruptcy of ABRAHAM LUSTGARTEN, Bankrupt,
Petitioner,

—against—

ABRAHAM LUSTGARTEN,
Respondent.

BRIEF AND ARGUMENT FOR RESPONDENT.

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INDEX.

LIST OF ALL CASES REFERRED TO.

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STATEMENT OF CASE.

BRIEF AND ARGUMENT FOR RESPONDENT.

The Trustee, of respondent bankrupt Lustgarten, by a writ of certiorari seeks to review the order of the Circuit Court of Appeals, Second Circuit, which reversed the District Court for the Southern District of New York, and granted respondent bankrupt, ABRAHAM LUSTGARTEN, his discharge.

On March 1st, 1921, respondent was petitioned into bankruptcy, and on April 4th, 1921, he was adjudicated.

In due course, the bankrupt respondent was examined before REFEREE OLNEY and it was disclosed that the bankrupt had been and was suffering from a defect of hearing (R., p. 55 and p. 58, fols. 91-92), and that he had become totally deaf. The learned Refere at the outset of the hearing believed

bankrupt to be shamming and seriously doubted his infirmity (R., p. 53, fol. 84).

By the Referee:

Q. None so deaf as those who won't hear, who don't want to. A. I don't hear you.

As the hearings continued, the learned Referee had a closer and better opportunity to judge respondent bankrupt as appears in (R., p. 55):

The Referee: You see, if it is a fact that this man does not hear anything, while it is a very difficult thing to know what to do with him——

Mr. Cohen: It is a most difficult case to handle.

The Referee: I don't think he even heard me then, because he did not even wink an eyelash.

Mr. Cohen: I do not doubt but that there is something the matter with him.

Respondent stresses this phase of the case in view of petitioner's contention in Point II that *"bankrupt with intent to conceal his financial condition, destroyed, concealed or failed to keep books of account of records from which his condition might be ascertained."*

It was established beyond a doubt that the bankrupt had been suffering from the malady of deafness and head noises for a period of about four years, prior to his bankruptcy, and that as a result thereof he had extreme difficulty in conferring with his employees and particularly with his bookkeepers. The examination of the bankrupt disclosed the following by one of the bookkeepers (R., p. 57, fol. 91):

> Q. Now, when you came to the place of business were the books kept regularly? A. No, he was supposed to give me a new set of books; that was the only condition that I started to work there, the books were jumbled horrible.

And again at (R., p. 58, fol. 91):

> Q. Did you have any difficulty in getting along with Mr. Abraham Lustgarten on account of his deafness? A. Yes, sir.

In due course respondent applied for a discharge and petitioner, as his Trustee, was authorized to oppose the discharge on the grounds set forth in creditors objections; on the hearing, the Trustee chose and elected to proceed on the specifications of the Corn Exchange Bank.

The specifications set forth four grounds of objection and on the hearings two of said grounds were abandoned and petitioner proceeded on the following grounds only (R., p. 1, fol. 2):

> "*First*: That the said bankrupt gave to the Corn Exchange Bank, an objecting creditor, a certain signed statement purporting to show its financial condition, which was false and that he obtained credit upon this false statement."
>
> "*Second*: That the bankrupt fraudulently concealed the sum of $2,000 which he transferred to Louis Lustgarten, his nephew, in payment of a fictitious debt."

After full and complete hearing of all witnesses, the learned Referee made a report and findings and recommended respondent's discharge (R., pp. 1-3).

On application to the District Court for confirmation of the Special Master's report, the District Court refused to confirm said report and denied respondent his discharge; on appeal by bankrupt respondent to the Circuit Court, the Circuit Court reversed the District Court and granted respondent's discharge, and rendered an opinion by Circuit Judge Mayer, reported in 289 Fed. Rep. 481, in part as follows (R., p. 72):

> "We are unable to distinguish the facts in the case at bar from those in the case just cited. *The nature of the statement is substantially the same.* In the case at bar, the lapse of time between the date of the statement and the obtaining of the loan was nearly ten months, i. e., from January 4, 1920, to October 29, 1920, while in the *B. & R.* case, the time was about six months, i. e., from June 2, 1920, to December 10, 1920. Both periods were in the same year, in *respect of which general financial conditions are discussed in the B. & R. case.*
>
> In the case at bar, *it is doubtful on the testimony whether it can be said that the bank relied on the bankrupt's statement;* but, in any event, as pointed out by Judge Rogers in the *B. & R.* case, the Bank was not justified in relying upon the statement.
>
> Specification I. This specification seems not to have been relied upon before the Special Master, but apparently was urged before the District Court. The bankrupt testified that his nephew had been in his employ for about nine or ten years and that beginning in 1919, the nephew's salary was $50.00 per week, of which he drew $30.00 and left with the bankrupt $20.00 for savings purposes. In 1920, his compensation was increased to $60.00, he drawing

only $40.00 and leaving the remaining $20.00 with the bankrupt for the same purpose. *In December, 1920, the nephew became engaged to be married and requested his uncle to pay him the amount thus retained and this amount was paid.* The accountant who was a witness on behalf of the trustee testified that in the bankrupt's general ledger under the heading "Commission on Sales," on December 8, 1920, there was an entry of $1,000.00 as having been paid to the nephew, Louis Lustgarten, and on December 22, 1920, $1,000.00, which was posted from the cash book. Thus there was no concealment whatever of the payment of these amounts to the nephew. There is no proof that the bankrupt was insolvent in December, 1920, and, as pointed out by the Special Master, the trustee did not call the nephew or any other person to show that, in any manner, the transaction was not genuine. The most that is argued is that the books did not contain credit entries to offset these debits. Accurate bookkeeping would have required a proper credit entry of $20.00 weekly,—a small amount as compared with the volume of the business of the bankrupt. In the statement to the bank, the liabilities for merchandise and bank accommodations are carefully and accurately set forth; and the failure to note these small credit entries we think was due to inadvertent faulty bookkeeping and not to any intent to conceal financial conditions.

We are satisfied from the record that the trustee failed to adduce proof to show that the bankrupt intended to conceal his financial condition by failing to make these credit entries of $20.00 weekly and such intent must be proved to bar a discharge under Section 14 (b) (2) of the Bankruptcy Law."

POINT I.

THE STATEMENT OF THE BANKRUPT GIVEN TO THE CORN EXCHANGE BANK ON FORM DRAWN AND PREPARED BY SAID BANK FOR BANKRUPT, SPECIFICALLY PROVIDED THAT THE BANK WAS TO RELY THEREON "AS WELL AS ON OTHER MATTERS" AND THE PROOF IN THE RECORD CONCLUSIVELY ESTABLISHES THAT THE CORN EXCHANGE BANK DID NOT RELY UPON THE STATEMENT IN EXTENDING CREDIT, AS THE BANK'S OFFICIALS AS WELL AS EVERY MERCHANT KNEW THAT THE MARKET CONDITIONS WERE SUCH THAT VALUES SHRANK TO UNPRECEDENT PROPORTIONS AND COURTS TOOK COGNIZANCE OF THOSE EXTRAORDINARY CONDITIONS. SO HELD IN B. & R. GLOVE CORP. 279 Fed. 372.

POINT II.

NO PROOF WAS ADDUCED BY THE PETITIONER THAT THE BANKRUPT WHILE INSOLVENT AND WITH INTENT TO CONCEAL HIS FINANCIAL CONDITION DESTROYED, CONCEALED OR FAILED TO KEEP BOOKS OF ACCOUNT OR RECORDS, FROM WHICH HIS CONDITION MIGHT BE ASCERTAINED, BUT ON THE CONTRARY, IT WAS BY REASON OF ENTRIES IN THE BANKRUPT'S BOOKS THAT PETITIONER WAS ABLE TO DISCOVER THAT SUCH PAYMENTS WERE MADE.

ARGUMENT ON POINT I.

The statement was given by the bankrupt after he had ascertained the figures from his bookkeeper and

by personal examination of the merchandise on hand (R., p. 37, fol. 58). Petitioner concedes correctness of entire statement, with the exception of items, merchandise on hand $39,004.97 and accounts outstanding $30,642.50 (R., p. 1, fol. 2). This financial statement given to the Bank has the clause following (R., p. 66, fol. 104):

> "On said date and Abraham Lustgarten, the undersigned make (s) such statement after *a personal examination of the merchandise on hand on said date as well as the books maintained and kept by me in the regular course and conduct of my business*, which books show all of the transactions on which the following statement is based. This statement is to be regarded by Abraham Lustgarten and by the Corn Exchange Bank as continuous and binding, and to form a true statement of the assets and liabilities of the undersigned, "AND OTHER MATTERS" to be relied upon by the Corn Exchange Bank upon application by the undersigned, for all loans until another statement, in writing shall be substituted for this, or this statement recalled."

The financial statement states and supports the facts in accordance with the contention of the bankrupt, urged before the learned Special Master, that there was an examination by the bankrupt of the merchandise on hand, as well as from the records appearing in the bankrupt's books, and that the bankrupt's books did not record all of his assets in view of premature closing of books by an incompetent bookkeeper (R., p. 39, fol. 61), Wechsler, an accountant, testified:

Direct examination by Mr. Bershad:

Q. What is your business, Mr. Wechsler? A. I am a public accountant.

Q. And have you been a public accountant for how long? A. About eight years.

Q. During which time have you had experience in auditing books of various mercantile concerns? A. I have.

Q. During your experience, have you had occasion to audit books of account of concerns doing business similar to the business of the bankrupt herein? A. I have.

Q. Are you familiar with the method in which the cloak and suit merchants conduct their business and keep their books? A. I am.

Q. Did you, sir, at my request, look over the books of the bankrupt in this proceeding? A. I did.

Q. After looking over the books of the bankrupt in this proceeding, did you make extracts from the said books, and did you make an audit and an examination of some of the items? A. I did.

Q. State to his Honor what you found after such audit? A. I found that the books had not been properly closed as of December 15th. It is customary to post all the purchases and sales up to the very end of the year. In this case there was no such posting made. The purchases and sales were not posted from the first of December, and I noticed some red figures put in later, which was evidently done by some accountant who attempted to close the books some time maybe a year or so later. From the looks of the books it struck me that the bookkeeper didn't know how to close them, and may have balled the thing up very badly.

In support of bankrupt's contention that the accounts and merchandise were correct as set forth in the financial statement, the following from the record is conclusive (R., p. 37, fol. 58):

> A. On December 15th, 1919, I had woolens, piece goods to the amount of $24,721.17. This was taken by the bookkeeper from the stock book. This amount of $24,721.17 does not represent the complete inventory. The complete inventory included all the merchandise I had on that day in the place, included all piece goods, all linings, all silks, all satins, velvets, mercerized goods, and also included the made up merchandise, consisting of coats, suits, dresses, capes, wraps; it also included all paper boxes, all wrapping paper, and all packing paper and twine, and trimmings and buttons and braids, stationery and printing—everything, the value of the merchandise I had in the place, taken at cost price, less discounts amounting to $39,004.97, the actual amount to the penny.
>
> Q. The item of merchandise of $24,721.17, as appearing in your books, as testified to by Mr. Barrett, the accountant for the Trustee, what did that represent; what did that include? A. This included the woolen piece goods only. That was taken from the stock book. The other merchandise we didn't keep no stock books for.
>
> Q. Was it made up or piece goods only? A. The $24,000 was piece goods only.
>
> Q. The balance of this amount of merchandise on hand consisted of what? A. I have explained what the balance of merchandise was.

Q. The Trustee's account showed that your books as of December 15th, 1919, record accounts receivable $9,053.25. The statement given to the bank shows outstanding accounts, $30,642.50. How do you explain this difference, if you can explain same? A. On December 15th, 1919, I had $9,053.25 accounts receivable. I had $5,071.81 in the hands of contractors. On December 15th, I had about $6,000 merchandise outstanding with my four salesmen. I had one salesman in San Francisco, one salesman in Chicago, one salesman in Boston, and one salesman in Baltimore. On the 15th day of December, 1919, I had about $4,000 merchandise outstanding with some of my customers, which was shipped to them on approval. This merchandise was posted in the customers' memo. book; also, the salesmen's samples was posted in the salesmen's memo. book. On the 15th day of December, 1919, in the evening, before we went home, my bookkeeper submitted to me the financial report, showing me and explaining me each and every item separate. She showed me that she had charge slips on her desk for merchandise that was shipped during the day, and a few days prior to that day, to the amount of about $6,000, which was not charged on account she didn't had no time to charge it, she was busy of working on closing the books. In all the total amount of accounts receivable amounted to $30,642.50, the actual amount to the penny.

It is important to note that the Corn Exchange Bank's statement contains a provision that the Bank agrees not only to rely upon the figures in the statement of the assets and liabilities of the

bankrupt, but in addition thereto, the Bank agrees with the bankrupt to rely in extension of credit on *matters and information outside of the statement*, as said financial statement specifically stipulates the bank's undertaking to rely on "AND OTHER MATTERS TO BE RELIED UPON BY THE CORN EXCHANGE BANK UPON APPLICATION BY THE UNDERSIGNED," etc., and in support of this, HORTON, the manager of the Corn Exchange Bank, conclusively proved that there was no reliance by the Bank on the figures in the statement at all, and that there were other matters, extraneous, as provided for by the financial statement, which operated on the mind of the bank official at the time the credit was extended; the record discloses (R., p. 16, fols. 27 to 34):

By Mr. Bershad:

Q. How long prior to October 9, 1920, had you known the bankrupt? A. I cannot say as to that. I have known him as customer of the bank.

Q. All you knew was the account appearing on the books? A. Yes, to the best of my recollections, I met him probably once or twice.

Q. If you met him outside, you would not know him? A. I don't know whether I would or not.

* * * * * *

Fol. 28

Q. Without him announcing who he was, would you know him if he came in and sat down? A. I cannot say positively, I may and I may not.

* * * * * *

Fol. 29

Q. So that you personally had nothing to do with the extension of the credit of $1,000 on

this note? A. I don't know what you mean, he has had a standing line of credit with us.

* * * * * *

Q. You didn't talk to Mr. Lustgarten at the time these papers were presented? A. I don't remember whether I did or not.

* * * * * *

Q. Did you have any conversation with him at the time this note of $5,000 was presented for discount? A. I don't remember, I don't recall.

* * * * * *

Fol. 31

Q. And the same answer holds true about the note of November 4th, 1920? A. If that is one of the notes I initialed, yes.

* * * * * *

Q. Can you state to his Honor any conversation that you had with this bankrupt at any time that you talked with him? A. No, I cannot state any conversation I had with him.

* * * * * *

Q. You say a clerk presented this paper? A. I said it was his custom. I don't know who presented these papers, Mr. Lustgarten or his clerk.

* * * * * *

Fol. 34

Q. That shows the condition you relied on was as of December 15th, 1919? A. Yes.

Q. The loan of October 29th, 1920, and November 4th, 1920, were almost a year later? A. Yes.

Q. Do you still persist in saying you made no comment on these figures? A. I did not.

Q. You are not interested to inquire whether there had been a change in the condition; the credit obtained from you personally was almost

ten or eleven months later, didn't you as a practical credit man know there must have been a change in his condition? A. I know there is a change every day.

Q. You knew, however, in spite of the contents of this clause, that it was a physical impossibility that that condition of his should have continued the same for almost ten months? A. As I said before, a man's condition changes all the time.

Q. So I say you knew you were not relying on the figures in here? A. I was relying on substantially the same condition, not on the same figures, but on the same condition.

And again at (R., p. 21, fols. 34-35):

Q. When he discounted these two notes, do you recall whether he had anything—question withdrawn. Then I understand you correctly to state you relied on each figure there? A. I relied on the statement as a whole.

Q. On each figure? A. I relied on the statement as a whole, the body of the statement.

Q. That inventory there was as of December 15th, 1919? A. The statement so says.

Q. That shows the condition you relied on was as of December 15th, 1919? A. I was relying on substantially the same condition, not on the same figures, but on the same condition.

The testimony of INGALLS of the Corn Exchange Bank likewise points to the fact that the Bank did not rely on the bankrupt's statement in extending the credit (R., p. 26, fol. 41):

Q. Do you know the bankrupt? A. I cannot say I could pick him out. I have met him.

* * * * * *

Q. This note of February 11th, 1921, Trustee's Exhibit 2? A. Yes, sir.

Q. Did you personally attend to this transaction? A. Yes, sir.

Q. Did you have any talk with the bankrupt at the time? A. No, sir.

Q. Did you see the bankrupt? A. No, sir.

* * * * * *

Fol. 42

Q. All you know is this note was handed in by some one and after that you went to your credit file and took out your credit reports, and what did you do then, did you refer to your ledger? A. Just a minute, I took out the credit information and found this man was entitled to this discount.

* * * * * *

Fol. 43

Q. What line of credit was the bankrupt here getting from your bank at the time? A. I think it was $11,000.

Q. Did you fix that? A. No.

Q. Who fixed that? A. The Board of Directors.

Q. Was that the limit of his line? A. No, sir.

Q. He had not exceeded his limit? A. No.

Q. How much was his limit with your bank? A. I think it was $15,000. I did not look at the books at all.

* * * * * *

Fol. 45

Q. Now, you knew, didn't you, Mr. Ingalls, that these figures of February 11th, 1921, could not possibly be the same as they were on the 15th of December, 1919? A. Naturally they could not be.

Q. You knew, then, did you not, that there was a change in his condition? A. Certainly, there must have been.

Q. And you knew when you say you relied on these figures as a whole that these figures could not possibly be as recorded in that statement? A. I did.

Q. You did not as a matter of fact rely on these figures on February 11th, 1921, that is correct, is it not? A. If you speak of the figures, yes, if you speak of the whole statement, no.

And again (R., p. 29, fol. 46):

By Mr. Cohen:

Q. In connection with your testimony that the figures had changed, or that you did not rely on the figures, what did you actually rely on when you had that statement in front of you? A. The whole statement calls for the man's condition on a certain date, we presume that to be the same unless he notifies us it is different.

Q. What you mean is, you do not depend on any individual figure, but you depend on the net results in coming to a conclusion as to how much credit he should get?

It further appears that the witness, Ingalls, and the witness, Horton, checked each other up on their testimony to be given before the Special Master, as is admitted by Ingalls (R., 29):

Q. He told you what testimony he gave here? A. Yes.

Q. He asked you to refresh your recollection as to the transaction? A. Yes.

It is therefore difficult to see why appellant petitioner fails to appreciate the fact that when the Corn Exchange Bank's credit manager referred to his files, he did not seek in his credit file for "*other matters to be relied upon by the Corn Exchange Bank*," and that the extension of the credit was not based upon nor in reliance on the statement at all. It is common knowledge that between January 5th, 1920, the date when the bankrupt made the statement to the Bank, and the months of October and November, 1920, and February, 1921, the dates when the loans were made by the Corn Exchange Bank, this country witnessed a frightful financial depression, and recession of prices and general stagnation resulted throughout every industry in the United States; so extensive and embracing was this panic that most seasoned institutions were rocked to their foundations. No set of business men were more fully alive to this financial situation than the bankers of the country. As evidence of that fact, there resulted a universal tightening of credits by all the banking institutions in the country during and beyond this period and the Corn Exchange Bank was no exception to this caution.

The Bank's manager, HORTON, frankly admits knowledge of these conditions. Then, the Bank surely knew that the bankrupt's merchandise and book accounts could not possibly have had the value which the statement accurately recorded at the date of the inventory. The merchandise item of $39,004.97 shrank in value considerably. The outstanding accounts of $30,642.50 representing claims against customers, no one could possibly know which of these book accounts continued solvent.

This admission by the Bank unquestionably is conclusive against the petitioner on the contention that the principle of law cited in the *B. & R. Glove*

Corp. case is inapplicable. In addition, the testimony quoted overwhelmingly establishes that there was no reliance on the statement.

In the cases cited by petitioner in Point I, the bankrupts had issued statements that were false in material respects and same were issued with fraudulent intent. The statements were relied upon by the creditors in the extension of credit and the courts in the cited cases properly held bankrupts barred from discharge, and are not authority for the points at issue in case at bar, where no proof at all was adduced to show either issuance of a false statement or reliance on any statement; assuming even if it can be urged that an inference may be indulged in for argument's sake, that the Corn Exchange Bank did rely on the statement, then the rule laid down by the Circuit Court in the *B. & R. Glove Corp.* case is sound and is applicable to the instant case.

The petitioner in Point I urges the Court to brand the respondent as having issued a false statement culpably because his employees failed to accurately record all of the figures in the books as previously pointed out. No evil design appears on the part of the respondent nor is there any proof that there was any suppression or concealment. It is worthy of note in this point to call the attention of the Court to the testimony of INGALLS of the Corn Exchange Bank quoted previously (R., p. 28, fol. 44, under liabilities), that the item of $20,000 appearing in the bankrupt's statement borrowed from the banks included therein a loan of $10,000 from the Corn Exchange Bank. Obviously, the testimony of INGALLS on this point was false, the statement having been given on January 5th, 1920, and the bankrupt's indebtedness to Bank on same date also amounted to the sum of $20,000, and the loan from the Corn Exchange Bank was

not made until October 29th, 1920, $5,000, and on November 4th, 1920, $5,000, all of which is quoted solely for the purpose of indicating the extent of a creditor's animus in an effort to block a merited discharge.

The petitioner has failed to establish the giving of a false statement within the meaning of Section 14, Subdivision B (3) of the Bankruptcy Act.

The decisions are uniform, holding that:

> "false is something more than erroneous or untrue, and its meaning is more far-reaching. It carries with it the stigma of being knowingly and intentionally untrue, and made with intent to deceive."
>
> "It has been held that an intent to defraud is essential; the world 'false' means more than 'erroneous' or 'untrue', and imports an intention to deceive and a materially false statement in writing must have been knowingly or intentionally untrue to bar a discharge."

Collier on Bankruptcy, 10th Edition, page 353;

In re Arenson, 28 Am. B. R., 113;

Gilpen vs. Merchants National Bank, 21 Am. B. R. 429.

Headnote: "To constitute a bar to a bankrupt's discharge under Section 14b (3) for obtaining property on credit 'upon a materially false statement "in writing" for the purpose of obtaining such property on credit the written statement made by the bankrupt should be knowingly and intentionally untrue and it is not sufficient that the statement be materially untrue.'"

Peck vs. Lowenbein, 24 Am. B. R., 138.

Judge Gray: "And they all imply conduct that is immoral, or at least unworthy in one seeking the reward of honesty that is intended to be conferred by a discharge and again it seems to us clear that the plain language of this third clause of Section 14b requires that the written statement made by the bankrupt, for the purpose of obtaining credit, should be knowingly and intentionally untrue, in order to constitute a bar to the discharge of the bankrupt. In other words, 'false statement' connotes a guilty scienter on the part of the bankrupt. This primary and ordinary meaning of the word 'false' cannot be ignored. It is the primary meaning given in the ordinary lexicons of the English language. * * * 'To charge a person with making a false statement is equivalent to charging him with uttering a falsehood and imputes a moral delinquency to the person so charged.' * * * The bankrupt who has made to a creditor, for the purpose of obtaining credit, a false statement—that is, one knowingly and intentionally untrue, or unworthy of the privilege of a discharge under the Act, and the Court will act upon information brought to it of such an act by any party in interest."

Gilpen vs. National Bank, 21 Am. B. R. 429.

There must be an intention to deceive that is always a material element in the proof, and such intent must be established.

In re Russell and Birkett, 5 Am. B. R. 608. * * *

The bankrupt's business could at all times be learned from an examination of his books.

> "The act does not require anybody to keep books nor fix any standard of bookkeeping. All it does in the premises is to provide that a discharge shall not be granted a bankrupt who has destroyed, concealed, or failed to keep books with intent thereby to conceal his financial condition. The intent must be shown to the satisfaction of the Court to bring the case within the statute and it would be a harsh and unjust consideration to say that the intent must as a matter of law be presumed from mere bad bookkeeping or from a mere failure to keep books."
>
> *In re Brochman*, 21 Am. B. R., 251 at 253.
>
> If the method used is appropriate to the business conducted and indicates the character of the accounts and the identity of persons to whom they refer it will suffice."
>
> Collier on Bankruptcy, Tenth Edition, p. 349.

ARGUMENT ON POINT II.

Petitioner's counsel in Point II of his brief urges that the mere fact of the entry by the bookkeeper of the payment to Louis Lustgarten of the debt by the bankrupt under the heading "commissions on sales" could have but one purpose, and that purpose to conceal his financial condition.

It has been pointed out in Point I of this brief that the book records of respondent and the entries in the books were made by several bookkeepers, all

of them concededly grossly incompetent, and no proof has been adduced by the Trustee to controvert this.

It will be remembered that Louis Lustgarten was a nephew of the respondent. The respondent had been doing a very large business for many years, and that Louis Lustgarten, a young man, was saving part of his salary with respondent, his uncle, until such time when he would need these funds; respondent standing towards this boy in the relation of a parent, promised to give him this money upon the occurrence of an important event. The following is disclosed in the record (R., p. 65, fol. 103):

> Q. Louis Lustgarten is your nephew? A. Yes.
>
> Q. When did you first employ him? A. About nine or ten years ago.
>
> Q. Did he have a written contract with you? A. Verbal contract.
>
> Q. What were the terms of his employment by you? A. During 1919 he was getting fifty dollars a week, he drew thirty and twenty remained for saving purposes; during 1920 he was getting sixty dollars a week; he drew forty and twenty remained for saving purposes; I told, "Any time you will need your money, you can have it, if it is a good cause, I will give it to you"; during the month of December, 1920, he got engaged; he asked me I should give him the money, and I give it to him.
>
> Q. Why doesn't the name of Louis Lustgarten appear in the salesman's commission book? A. The only amounts that appears in the salesman's commission book, that is that work for commission only; he wasn't a commission man, he was a salaried man.

> Q. Have you any entry in any book of an account with Louis Lustgarten? A. It must be some entry when they got out the Two thousand dollars; it must be entered in some book.

The explanation given by the respondent that in December, 1920, Louis Lustgarten became engaged and he needed this money, and asking for it received it. Had there been any doubt as to the truth of these assertions, the Trustee could readily and would undoubtedly have subpoenæd Louis Lustgarten to disprove these assertions.

The bankrupt made these payments to Louis Lustgarten in December, 1920, and no proof was introduced that he was insolvent then or that the payments to Louis Lustgarten were not genuine.

Louis Lustgarten had been saving this money with his uncle, appellant herein, for the very situation that arose in December, 1920, to wit: his engagement to be married. The Trustee's counsel could easily have verified or disproved this story, as Louis Lustgarten was not beyond the jurisdiction of the Court, and petitioner having failed to do so, he must undoubtedly have been satisfied with the truth of these facts as this objection was not even seriously urged till the appeal. Petitioner cannot now torture a new version into the record on this payment.

As a matter of fact, Trustee's counsel does not even urge that there was any concealment by the bankrupt in the payment of the $2,000 to bankrupt's nephew, as it was solely through the record in bankrupt's books under "commission account" that the Trustee found that such a payment had been made and no proof at all that the nephew was holding this money for respondent.

The law is that there is always a presumption against fraud, and not the reverse.

Davis vs. Stevens, 4 A. B. R. 763, 104 Federal, 235.

Lansing Boiler Works vs. Ryerson, 11 Am. B. R., 561, 128 Federal, 701.

The Court reiterated the well settled principle of law that a conveyance or transfer made in good faith for an antecedent or present consideration, is not forbidden by the statute, notwithstanding the effect may be that it hinders or delays creditors by removing from their reach assets of the debtor.

Nor is an intention to use the proceeds of one's property to pay certain creditors in preference to others, a fraudulent intent, although it may be a preferential intent.

Githens vs. Shiffler, 7 Am. B. R., 453, 112 Federal, 505; 12 Am. B. R., 326, 129 Federal, 646.

When the payment was made to Louis Lustgarten in December, 1920, of the money due him, the bankrupt was not insolvent, and until such proof was adduced, the bankrupt was not even called upon to disprove any fraudulent intent by any satisfactory explanation.

Hoffschlaeger vs. Young Nap, 12 Am. B. R., 517.

A preferential transfer is quite different from a fraudulent transfer.

Barden vs. Berten Shaw, 11 Am. B. R., 308; 4 Am. B. R., 67, 100 Federal, 282.

POINT III.

THE LEARNED SPECIAL MASTER WAS THE SOLE JUDGE OF THE FACTS IN THE CASE AT BAR, AND THE CIRCUIT COURT PROPERLY REVERSED THE ORDER OF THE DISTRICT COURT AND THE DECISION OF THE CIRCUIT COURT SHOULD NOT BE DISTURBED UNLESS THE FINDINGS AND CONCLUSIONS OF THE SPECIAL MASTER COULD NOT BE SUPPORTED BY THE EVIDENCE; THE TESTIMONY WARRANTS THE FINDINGS AND CONCLUSIONS OF THE LEARNED SPECIAL MASTER.

POINT IV.

THE DECREE OF THE CIRCUIT COURT OF APPEALS SHOULD BE AFFIRMED WITH COSTS AND RESPONDENT GRANTED HIS DISCHARGE.

Respectfully submitted,

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